T-Mobile

July 8, 2004

***Via Electronic Filing***

Mr. William Maher, Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. John Muleta, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. John A. Rogovin, General Counsel
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W..
Washington, D.C. 20554

**Re:** ***Written Ex Parte Communication***
*Wireless Termination Tariffs, CC Docket No. 01-92*

Gentlemen:

T-Mobile USA, Inc. submits this written *ex parte* in support of the declaratory ruling petition it filed on September 6, 2002 regarding the lawfulness of local exchange carrier ("LEC") wireless termination tariffs.[1] This letter focuses on Commission and court decisions, adopted since the petition was filed, that conclusively demonstrate that one-sided wireless termination tariffs purporting to govern interconnection arrangements in the absence of an agreement are facially unlawful under federal law. An expeditious FCC decision in this proceeding has become more urgent following the collapse of industry negotiations that attempted to craft a proposed comprehensive regulatory regime for intercarrier compensation.

As an initial matter, the FCC should do two things to help resolve long simmering disputes between rural local exchange carriers ("RLECs") and wireless carriers and facilitate the execution of interconnection agreements between them. First, the FCC should confirm that RLECs can request a wireless carrier to commence interconnection negotiations, contrary to the misconception held by some RLECs that they do not have this option. Second, consistent with federal court decisions and its own precedent, the FCC should confirm that RLECs can file optional "opt in" interconnection tariffs (similar to RBOC SGATs), but that they cannot file mandatory "default" interconnection tariffs purporting to govern the terms of interconnection in the absence of an agreement.

[1] *See Public Notice,* Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic, CC Docket No. 01-92, DA 02-2436, 17 FCC Rcd 19046 (Sept. 30, 2002). This petition was filed jointly by T-Mobile, Western Wireless, Nextel Communications, and Nextel Partners.

Main 202 654 5900
Fax 202-654-5963
401 9th Street NW Suite 550
Washington, DC 20004

## I. UNILATERALLY FILED LEC INTERCONNECTION TARIFFS ARE INCONSISTENT WITH, AND THEREFORE PREEMPTED BY, FEDERAL LAW

State tariffs, unilaterally filed by RLECs to govern their interconnection arrangements with wireless carriers in the absence of an interconnection agreement, are inconsistent with, and therefore preempted by, federal law. LEC interconnection tariffs fall into two categories: (1) optional tariffs whereby a competitive carrier can "opt-in" the terms specified in the tariff; and (2) mandatory, "default" tariffs, which purport to apply even without the consent of the interconnecting carrier. Both the FCC and federal courts have recognized that optional "opt-in" tariffs are consistent with federal law, while mandatory "default" tariffs are inconsistent with, and thereby preempted by, federal law.

### A. Both the FCC and Federal Courts Uniformly Hold That Mandatory Default Interconnection Tariffs Are Preempted by the 1996 Act

#### 1. The FCC Has Rejected Mandatory Default Interconnection Tariffs

The FCC has recognized that tariff procedures are "mutually exclusive" from the interconnection procedures Congress established in the 1996 Act and that use of "the tariff process to circumvent the section 251 and 252 processes cannot be allowed."[2]

> [I]t seems evident that any federal tariff purporting to govern intercarrier compensation for ISP-bound traffic could be reasonable only if it mirrors any applicable terms of the party's interconnection agreement . . . .[3]

In that case, the FCC declared that the ISP termination tariff before it was unlawful and void *ab initio*, a decision affirmed on appeal.[4]

More recently, the Wireline Competition Bureau rejected an incumbent LEC's argument that it could unilaterally void the prices contained in an interconnection contract simply by filing tariffs containing higher prices. The Bureau observed that the ILEC's proposal could "thwart petitioners' statutory right to ensure that the new rates comply with the requirements of sections 251 and 252."[5] The Bureau recognized that "[c]onsistent with the statute's recognition of the parties' right to negotiate interconnection agreements," carriers are "certainly free to agree that services will be provided pursuant to tariffs."[6] If interconnecting carriers "fail to agree," however, a LEC "cannot use tariffs to circumvent the Commission's determinations under section 252 or the right of federal court review under section 252(e)(6)."[7]

---

2 *Bell Atlantic* v. *Global NAPs Reconsideration Order,* 15 FCC Rcd 5997, 6002 ¶ 14 (2000).

3 *Bell Atlantic* v. *Global NAPs Order,* 15 FCC Rcd 12946, 12959 ¶ 23 (1999).

4 *See Global NAPs* v. *FCC,* 247 F.3d 252 (D.C. Cir. 2001), *cert. denied,* 534 U.S. 1079 (2002).

5 *Virginia Arbitration Order,* 17 FCC Rcd 27039, 27331 ¶ 601 (2002).

6 *Id.* at 27332 ¶ 602.

7 *Ibid.*

In contrast to mandatory, default tariffs, the FCC has recognized that optional, "opt-in" tariffs are consistent with the Act.[8] For example, in its *Texas Preemption Order,* the FCC declined to preempt a state statute that required ILECs to offer local services for resale at a five-percent discount (as opposed to the Act's avoided cost standard). The FCC noted that under the statute, no carrier was required to purchase service at this discount level and that the tariff constituted "merely an option" for competitive carriers:

> We agree with the Texas Commission's construction that [the statute] provides an <u>optional</u> resale avenue that does not interfere with the ability of [competitive carriers] to invoke sections 251 and 252 of the Act.[9]

Thus, RLECs cannot lawfully assert that wireless carriers are automatically subject to the terms of the tariffs – when wireless carriers have not agreed to the terms contained in the tariff and when the tariffs may conflict with applicable federal law.

### 2. Federal Courts Have Similarly Ruled That, Unlike Optional "Opt-in" Tariffs, Mandatory Default Interconnection Tariffs Are Unlawful

Federal courts have also ruled that mandatory default tariffs purporting to govern the terms of interconnection in the absence of an agreement are preempted by the Act because such tariffs "effectively would allow [the LEC] to dictate the terms" of interconnection.[10] Courts had held, however, that "opt-in" tariffs, whereby a competitive carrier can elect tariff terms instead of those contained in an interconnection contract, are consistent with the 1996 Act.[11] An "opt in" tariff effectively operates like a Statement of Generally Available Terms ("SGAT"), whereby an interconnecting carrier can chose to "opt into" the SGAT terms it desires.[12]

Several federal court decisions, issued in the two years since the time the Wireless Termination Tariff Petition was filed, confirm that "default interconnection tariffs" are unlawful and preempted by the 1996 Act,[13] while optional, "opt-in" tariffs are permissible.[14]

---

8 *See, e.g., Starpower* v. *Verizon-South,* 18 FCC Rcd 23625 (2003)(carriers agree in interconnection contract to use the definition of 'local' contained in a LEC tariff).

9 *Texas Preemption Order,* 13 FCC Rcd 3460, 3526 ¶ 139 (1997)(emphasis added). It bears nothing that the issue in this case was not the consistency of the tariff process *vis-à-vis* Section 252 of the Act, but the consistency of the five percent discount option *vis-à-vis* the Section 253 prohibition on entry barriers.

10 *MCI* v. *GTE,* 41 F. Supp. 2d 1157 (D. Or. 2000).

11 *U S WEST* v. *Sprint,* 275 F.3d 1241 (10th Cir. 2002). As this court noted, with such "opt in" arrangements, the tariffing carrier is "not . . . attempting to bypass the negotiation process that creates interconnection agreements," but is rather "ensur[ing] that a CLEC will be able to obtain the most favorable prices and terms available, thereby allowing it to remain competitive in the local marketplace." *Id.* at 1250.

12 *See* 47 U.S.C. § 252(f); 47 C.F.R. § 51.809.

13 *See, e.g., Wisconsin Bell* v. *Bie,* 340 F.3d 441 (7th Cir. 2003), *cert. denied,* 157 L. Ed. 2d 973 (Jan. 12, 2004); *Verizon North* v. *Strand,* 309 F.3d 935 (6th Cir. 2002), *cert. denied,* 123 S. Ct. 1649 (2003), *aff'g* 140 F. Supp. 2d 803 (W.D. Mich. 2000); *Verizon North* v. *Coast to Coast,* No. 00-CV-71442-DT (E.D. Mich., Oct. 3, 2002), *aff'd Verizon North* v. *Coast-to-Coast,* 367 F.3d 577 (6th Cir. 2004). *Compare Indiana Bell* v. *Indiana Utility Regulatory Comm'n,* 2003 U.S. Dist. LEXIS 6452 (S.D. Ind., March 11, 2003), *aff'd* 359 F.3d 493 (7th Cir. 2004).

In one recent case, a CLEC unilaterally filed a default ISP termination tariff that purported to require other carriers to compensate the CLEC for sending ISP traffic to it, with the tariff also specifying the rate of compensation allegedly due – the equivalent of an RLEC wireless termination tariff.[15] The ILEC challenged the tariff, arguing that it was preempted by the procedures set forth in Sections 251/252 of the 1996 Act. The Michigan public utility commission ("PUC") asserted that its tariff approval order was lawful because the tariff did "not substantially prevent" implementation of the Section 251/252 procedures and was "fully consistent with the [Act's] purpose of promoting competition."[16] The federal district court rejected the PUC's arguments, held that the tariff procedure was preempted by the 1996 Act, and vacated the PUC's tariff approval order:

> The Court finds that the MPSC's decision to impose a tariff in the absence of an interconnection agreement is inconsistent with the [Act] as it contravenes the clear guidelines for negotiating and reaching an interconnection agreement set forth under § 252. . . . Imposing the tariff results in a chilling, rather than enhancement, of competition in contravention of the [Act's] aim. As such, the tariff is unenforceable.[17]

The Sixth Circuit recently affirmed this ruling, holding that the PUC order is "inconsistent with the negotiation and arbitration provisions of § 252 and thus is preempted by the Act":

> This MPSC order required Verizon to pay termination for costs to Coast for ISP-bound calls on the basis of a state tariff filed by Coast. There was no interconnection agreement, no request for negotiations by Coast, and no state-administered arbitration between Verizon and Coast in the event of commenced, but stalled negotiations. . . . [T]he MPSC's order here permits the MPSC to bypass the federal statutory process for reaching an interconnection agreement and to create a competitive relationship via the filing of a unilateral tariff. Instead of achieving a reciprocal compensation arrangement via the negotiation and arbitration mechanism provided in the Act, the MPSC permitted the institution of an interconnection agreement by fiat. Such a result is inconsistent with the elaborate statutory framework of § 252.[18]

In an earlier case, the Sixth Circuit declared that tariffs purporting to govern an interconnection arrangement in the absence of a Section 252 agreement are "invalid" because they "completely ignore and bypass the detailed process for interconnection set out by Congress in the [Act]" – namely, "private negotiation and arbitration aimed at creating interconnection agreements that are then subject to state commission approval, FCC oversight, and federal judicial review."[19] As the Seventh Circuit ruled in August 2003, the tariff procedure "*has* to interfere with

---

14 *See, e.g.*, *Michigan Bell* v. *MCImetro*, 323 F.3d 348 (6th Cir. 2003), *rev'g* 128 F. Supp. 2d 1043 (E.D. Mich. 2001).

15 *See Verizon North* v. *Coast to Coast,* No. 00-CV-71442-DT (E.D. Mich., Oct. 3, 2002).

16 *Id.*, Slip Op. at 10.

17 *Id.* at 10-11.

18 *Verizon North* v. *Coast-to-Coast,* 367 F.3d 577 (6th Cir. 2004).

19 *Verizon North v. Strand, supra,* 309 F.3d at 941 and 944.

the procedures established by the federal act" because the tariff process "shortcircuits negotiations" and "places a thumb on the negotiating scales."[20] As the Sixth Circuit stated earlier this year, a PUC order recognizing one-side interconnection tariffs that are unilaterally filed constitutes "a fist slamming down on the [negotiating] scales":

> The order does not just slightly unbalance the negotiations by forcing the incumbent to show its hand. It instead completely forestalls the need for negotiations. . . . This MPSC order eliminates the virtues of *negotiated* competition ensconced in § 252, and it eliminates all incentive to adhere to the federal statutory process. Under the MPSC's order, competitors in the future would have the incentive to file a state tariff rather than request a reciprocal compensation agreement under §§ 251(b)(5) and 252.[21]

Likewise, RLEC wireless termination tariffs, whereby the dominant incumbent carrier imposes unilaterally on competitive carriers the terms of interconnection, are incompatible with the procedures Congress established in Sections 251/252. These RLEC tariffs are not "opt in" arrangements, whereby a competitive carrier can elect voluntarily to use the terms contained in the tariffs. These RLEC tariffs are not even offered on a "take it-or-leave it" basis, because according to RLECs, the tariff terms apply automatically and control interconnection terms – unless and until a PUC approves a contract following arbitration.[22] Instead, these RLEC wireless termination tariffs are offered on "take it or take nothing" basis – a procedure that is antithetical to the negotiation/arbitration procedure that Congress has established for intercarrier interconnection.

### 3. Default Interconnection Tariffs Are Neither Consistent With, Nor Required By, Sections 251 and 252 of the Communications Act

RLECs assert that their mandatory, default wireless termination tariffs are consistent with the procedures Congress established in Sections 251 and 252.[23] The simple response is that federal courts and the FCC have already – and with unanimity – rejected this argument. In fact, mandatory, default tariffs are flatly inconsistent with the procedures that Congress has established. Among other things:

- Under the Act, interconnection terms are to be initially negotiated by the two involved carriers; with tariffs, in contrast, an RLEC – a "monopolist" according to the FCC[24] – sets unilaterally the terms of interconnection applicable to its com-

---

20 *Wisconsin Bell, supra,* 340 F.3d at 444-45 (emphasis in original).

21 *Verizon North* v. *Coast-to-Coast,* 367 F.3d at 577 (emphasis in original).

22 Of course, an ILEC that obtains its interconnection "wish list" simply by filing unilaterally an interconnection tariff has absolutely no incentive to agree voluntarily in negotiations to terms that are less attractive than those contained in the tariff.

23 *See, e.g.,* Organization for the Advancement and Protection of Small Telecommunications Companies Reply Comments, CC Docket No. 01-92, at 2-3 (Nov. 1, 2002); Letter from W.R. England, Brydon, Sewrengen & England, to Marlene H. Dortch, CC Docket Nos. 01-92, 96-45 and 95-116 (Oct. 31, 2003).

24 *See* Opposition of the Federal Communications Commission to Petitioners' Emergency Motion for Expedited Review at 1 and 5, *NTCA* v. *FCC*, No. 03-1443 (D.C. Cir., filed Jan. 16, 2003).

petitors, and RLECs often file their tariffs without even advising wireless carriers of the filing. Having unilaterally established the terms it desires, the RLEC thereafter has no incentive to agree to different terms during negotiations because tariffs "place a thumb on the negotiating scales."[25]

- During arbitration under the Act, the LEC bears the burden of demonstrating that its proposed interconnection terms are consistent with the Act's requirements; in contrast, in tariff proceedings the burden is generally on wireless carriers to convince the PUC to reject the incumbent's tariff proposal.
- Negotiated and arbitrated agreements are reviewed against federal law, including FCC rules; tariffs, in contrast, are generally evaluated under state law requirements, which may be very different from federal law requirements.
- With interconnection contracts, appellate review is exclusively undertaken by federal courts to ensure compliance with federal law; in contrast, state appellate courts using state laws have historically reviewed tariff decisions.[26]
- Wireless termination tariffs often specify that the RLEC will block mobile-to-land calls if the wireless carrier does not comply with every provision contained in the one-sided, unilaterally filed tariff.[27]

### B. Interconnection Tariffs Filed Without Prior Negotiations Are Invalid Under FCC Orders and Rules Entered Pursuant to Sections 201 and 332

Even assuming there is an ambiguity over the lawfulness of default interconnection tariffs under the 1996 Act (and federal courts have found no such ambiguity), FCC orders and rules make plain that LEC interconnection tariffs filed without prior negotiations are unlawful.

The FCC, in establishing cellular service 20 years ago, ruled that LEC-wireless interconnection "should be negotiated among the carriers involved and be made the subject of an intercarrier agreement."[28] Some LECs thereafter refused to negotiate with cellular carriers and instead attempted to dictate unilaterally the terms of interconnection *via* state interconnection tariffs. In response, the FCC clarified that under its good faith negotiation policy established pursuant to Section 201 of the Act, LEC "tariffs reflecting charges to cellular carriers will be filed only after the co-carriers have negotiated agreements on interconnection," and that a LEC filing a tariff before an agreement has been reached engages in bad faith, which is actionable in a Sec-

---

[25] *Wisconsin Bell, supra,* 340 F.3d at 444.

[26] However, the Supreme Court's ruling in *Verizon Maryland* v. *Public Service Comm'n,* 535 U.S. 635, 641-44 (2002) suggests that federal court review is available for PUC decisions involving interconnection tariffs. Indeed, this is the very procedure used in *Wisconsin Bell* v. *Bie,* 340 F.3d 441 (7th Cir. 2003), *cert. denied,* Nos. 03-603, 03-656 (Jan. 12, 2004).

[27] Indeed, the Minnesota PUC recently affirmed this blocking provision. *See Wireless Local Termination Tariff,* Docket No. P-551/M-03-811, 2003 Minn. PUC LEXIS 133 at *19 (Nov. 18, 2003).

[28] *Cellular Communication Systems,* 86 F.C.C.2d 469, 496 ¶ 56 (1981). *See also Radio Common Carrier Interconnection Policy Statement,* 59 R.R.2d 1275 (1986)("[W]e must leave the terms and conditions to be negotiated in good faith between the cellular operator and the telephone company.").

tion 208 complaint.[29] As the FCC later explained, to hold otherwise "would mean that, when an impasse is reached, the landline company could proceed unilaterally to file its tariffs, thereby rendering meaningless the negotiations already conducted on this matter."[30]

Congress expanded FCC authority over wireless carriers in the Omnibus Budget Reconciliation Act of 1993, so the FCC could "establish a Federal regulatory framework to govern the offering of all commercial mobile services."[31] Congress noted that mobile services "by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure" and that "the right to interconnect [is] an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."[32] Among other things, Congress amended Sections 2(b) and 332(c) by giving the FCC the authority to establish the terms of LEC-wireless interconnection for all traffic, including intrastate traffic.[33] The FCC thereafter adopted rules implementing this new authority,[34] and in doing so, it reaffirmed that "we expect that tariffs reflecting charges to cellular carriers will be filed only after the co-carriers have negotiated agreements on interconnection."[35]

Two holdings from this body of law are relevant to the current dispute. First, even if the 1996 Act does not expressly authorize LECs to request interconnection negotiations, RLECs may seek such negotiations under the FCC's Section 201/332 rules. Under these rules, wireless carriers are required to negotiate in good faith, and the refusal of a wireless carrier to negotiate in response to a specific LEC request for negotiations would *ipso facto* constitute bad faith. Second, LECs may not unilaterally establish the terms of interconnection by filing tariffs. The FCC made clear in 1987, in 1989 and again in 1994 that a LEC engages in bad faith by filing tariffs before negotiating the terms of interconnection.[36]

---

29 *Radio Common Carrier Declaratory Ruling,* 2 FCC Rcd 2910, 2916 ¶ 56 (1987).

30 *Radio Common Carrier Reconsideration Order,* 4 FCC Rcd 2369, 2370-71 ¶ 14 (1989). LECs argued at the time that the FCC did not have authority to impose a good faith negotiation obligation on them because Section 2(b) of the Act reserved to the states regulatory authority over intrastate interconnection, and most LEC/CMRS traffic involves intrastate traffic. The FCC responded that "the conduct of interconnection negotiations cannot be separated into interstate and intrastate components," and it therefore preempted states from permitting LECs to avoid their obligation to negotiate interconnection terms in good faith. *See Radio Common Carrier Declaratory Ruling,* 2 FCC Rcd at 2912-13 ¶ 21. This LEC argument became moot with the enactment of the 1993 Budget Act and the amendment to Section 2(b) of the Communications Act.

31 H.R. CONF. REP. NO. 103-213, 193d Cong., 1st Sess., at 490 (1993).

32 H.R. REP. NO. 103-111, 193d Cong., 1st Sess., at 260-61 (1993).

33 *See, e.g., Unified Intercarrier Compensation Regime,* 16 FCC Rcd 9610, 9640 ¶ 84 (2001).

34 *See* 47 C.F.R. § 20.11.

35 *Second CMRS Report and Order,* 9 FCC Rcd 1411, 1497 ¶ 229 (1994).

36 Some RLECs contend they can ignore these Section 201/332 rules and policies because they predate the 1996 Act. *See, e.g.,* Alliance of Incumbent Rural Telco Comments, CC Docket No. 01-92, at 14-15 (Oct. 18, 2002); Michigan ILEC Comments, CC Docket No. 01-92, at 5 (Oct. 18, 2002); Minnesota Independent Coalition Comments, CC Docket No. 01-92, at 3 (Oct. 18, 2002). This argument is mistaken because these rules and policies remain undisturbed and in effect – despite enactment of the 1996 Act. *See, e.g., AirTouch Cellular* v. *Pacific Bell,* 16 FCC Rcd 13502 (2001)(ILEC violated Rule 20.11 when it failed to pay reciprocal compensation to a wireless carrier even after the 1996 Act became effective).

In summary, even assuming *arguendo* there is ambiguity in the 1996 Act whether RLECs can request interconnection negotiations or file interconnection tariffs without the conduct of negotiations, effective FCC orders and rules make clear that an RLEC: (a) may ask a CMRS carrier to commence good faith negotiations; and (b) may not unilaterally file a tariff in lieu of negotiations.

### C. The Missouri Appellate Court Decision Upon Which Some RLECs Rely Was Wrongly Decided and Is Entitled to No Precedential Weight

Some RLECs have argued that a recent Missouri Court of Appeals decision, *State ex rel. Sprint Spectrum* v. *Missouri Public Service Comm'n,* 112 S.W.3d 20 (Mo. App. 2003), confirms that RLEC wireless termination tariffs are lawful.[37] This decision , however, is at complete odds with the FCC and federal court decisions discussed above, and is as a result, entitled to no precedential weight.[38] If anything, the decision demonstrates why prompt FCC action on the Wireless Termination Tariff Petition is so important.

The Missouri court recognized that "[w]here federal statutes establish a comprehensive scheme to address a particular issue, a state has no authority to use different procedures than those prescribed by federal law."[39] However, the court then concluded that the 1996 Act does not contain a "comprehensive scheme" addressing interconnection and that, therefore, the Missouri PUC did "not use its tariff-approval authority to supplant federal law."[40] The Missouri court reached this conclusion even though federal courts had already held that "Congress designed a comprehensive system" over intercarrier interconnection.[41]

The Missouri court cited two reasons for its view that the 1996 Act does not entail a comprehensive scheme governing interconnection. First, the court stated that the Act "requires 'local exchange carriers' – such as the rural carriers – to negotiate in good faith and establish compensation arrangements for the termination of traffic, but it does not impose the same obligation on wireless carriers."[42] This conclusion constitutes clear legal error. As discussed above, both the Act and FCC rules impose a clear duty on wireless carriers to negotiate in good faith, including when it is the incumbent carrier that initiates the negotiation request.

Second, the Missouri court concluded that the 1996 Act does not provide for a comprehensive interconnection regime because the Act does "not provide a procedure by which the wireless companies can be compelled to initiate or negotiate compensation arrangements with

---

37 *See, e.g.,* Letter from W.R. England, Brydon, Sewrengen & England, to Marlene H. Dortch, CC Docket Nos. 01-92, 96-45 and 95-116 (Oct. 31, 2003).

38 Indeed, state court decisions that are at complete odds with federal law do not constitute relevant precedent upon which the FCC can rely to determine an issue in controversy.

39 *State ex rel. Sprint Spectrum* v. *Missouri Public Service Comm'n,* 112 S.W.3d 20, 25 (Mo. App. 2003) ("*Sprint* v. *Missouri PSC*").

40 *Id.*

41 *Verizon North* v. *Strand,* 309 F.3d 935, 939 (6th Cir. 2002), *cert. denied,* 123 S. Ct. 1649 (2003), *aff'g* 140 F. Supp. 2d 803 (W.D. Mich. 2000).

42 *Sprint* v. *Missouri PSC,* 112 S.W.3d at 25.

local exchange carriers," and thus, RLEC interconnection tariffs "fill a void in the law."[43] There are several factual and legal flaws with this unsupported conclusion, including:

1. The undisputed record evidence before the PUC and the appellate court showed that several wireless carriers did ask the Missouri RLECs to commence negotiations. The RLECs admitted they could have pursued arbitration in response to these requests, but they unilaterally decided that filing tariffs was "the most efficient resolution of these issues" because they could then achieve their interconnection "wish list" without give-and-take negotiations and/or arbitration.[44]
2. Even if one were to ignore this uncontrovered record evidence, the fact that the 1996 Act does not affirmatively grant to LECs the right to request interconnection negotiations does not mean that LECs are therefore prohibited from making such requests, as demonstrated above.

The Missouri court's decision contains other flaws. For example, the court uncritically accepted the Missouri PUC's conclusion that RLECs are exempt from their obligations under Section 251(b)(5) of the Act "because no agreements were ever entered into by the wireless companies and the rural carriers."[45] This legal conclusion is flatly inconsistent with the FCC's repeated rulings that LECs cannot use the absence of interconnection contracts as an excuse not to comply with their explicit statutory obligations under Section 251(b).[46] Moreover, the only federal court decision the Missouri court relied upon involved dicta.[47]

The Missouri court's interpretation of the Communications Act is wholly inconsistent with the language and spirit of the Act, as well as the decisions of all of the FCC and federal courts that have interpreted and applied the same federal statute. The FCC should, therefore, accord no weight to this aberrant state court ruling.[48]

---

43 *Id.* at 25-26.

44 *See* Motion for Rehearing and Alternative Application for Transfer, with Suggestions in Support, No. WD-60928, at 6-7 (Mo. Ct. App., filed May 13, 2003), *quoting* testimony of ILEC witness Schoonmaker.

45 *Sprint* v. *Missouri PSC,* 112 S.W.3d at 25.

46 *See, e.g., Intermodal Porting Order*, 18 FCC Rcd 23697 (2003); *TSR Wireless* v. *U S WEST,* 15 FCC Rcd 11166 (2000), *aff'd Qwest* v. *FCC,* 252 F.3d 462 (D.C. Cir. 2001).

47 *See Sprint* v. *Missouri PSC,* 112 S.W.3d at 25 ("Federal courts have recognized the right of states to enforce tariff provisions which are not inconsistent with the Act. Mich. Bell. Tel. Co. v. MCI, 128 F. Supp. 2d 1043, 1054 (E.D. Mich. 2001)."). This federal district court did state in passing that a "State may continue to enforce tariff provisions," but it nevertheless vacated the PUC tariff order before it. *See Michigan Bell,* 128 F. Supp. 2d at 1054.

48 Even if the Missouri court was correct that Congress did not "occupy the field" with a comprehensive interconnection scheme, the wireless termination tariff in that case still should have been preempted "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" that interfered with "the methods by which the federal statute was designed to reach [its] goal." *Geier v. American Honda Motor*, 529 U.S. 861, 873 (2000); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 103 (1992). Mandatory RLEC interconnection tariffs, where the incumbent monopolist unilaterally imposes the terms of interconnection on other carriers, inherently conflict with the competitive regime that Congress has established and should have been voided, if not on grounds of preemption, then on the alternative ground of conflicts preemption.

## II. EVEN IF WIRELESS TERMINATION TARIFFS CONSTITUTE A LAWFUL PROCEDURE, THEY MUST STILL SATISFY THE SUBSTANTIVE REQUIREMENTS OF THE 1996 ACT

RLEC wireless termination tariffs are unlawful even if the FCC decides that, as a general matter, the tariff procedure can be deemed consistent with the negotiation/arbitration/federal court review procedures that Congress established in the 1996 Act and its Section 201/332 rules. Specifically, RLEC wireless termination tariffs contravene the substantive requirements contained in both Section 251(b)(5) and Section 252(d)(2).

### A. Wireless Termination Tariffs Contravene a LEC's Duties Under Section 251(b)(5) of the Act

Section 251(b)(5) imposes on "each local exchange carrier" the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[49] The bill-and-keep arrangements that carriers ordinarily use for traffic exchanged *via* indirect interconnection (generally without a contract) meet this statutory requirement, because the Act recognizes bill-and-keep as an arrangement that affords "the mutual recovery of costs through the offsetting of reciprocal obligations."[50] The execution of an interconnection contract, whereby each carrier recovers its call termination costs from the originating carrier, would likewise satisfy this statutory duty.

Wireless termination tariffs, in contrast, do not satisfy a LEC's statutory duty "to establish reciprocal compensation arrangements." The Act defines reciprocal compensation as the "mutual and reciprocal recovery by *each* carrier of costs associated with the transport and termination on *each* carrier's network facilities."[51] Wireless termination tariffs typically involve one-way arrangements – that is, they require wireless carriers to pay RLECs for call termination, but the tariffs do not require RLECs to pay wireless carriers for their call termination costs. The FCC has repeatedly ruled that such one-sided, non-reciprocal arrangements are unlawful.[52] Given the clarity of the statutory command – LECs have the "duty to establish reciprocal compensation" – an RLEC cannot unilaterally establish a non-reciprocal arrangement simply by proclaiming a right to its escape statutory obligations by filing an inconsistent piece of paper with a state commission.

---

49 47 U.S.C. § 251(b)(5). Although Congress determined not to impose the same duty on wireless carriers, they are nonetheless required to provide reciprocal compensation *via* FCC rule. *See* 47 C.F.R. § 20.11(b)(2). In addition, the "automatic rural exemption" contained in Section 251(f)(1) applies to the duties imposed only by Section 251(c), not by Section 251(b). *See* 47 U.S.C. § 251(f)(1); *LNP Reconsideration Order,* 12 FCC Rcd 7236, 7373 ¶ 119 (1997)("Because Sections 251(b) and 251(c) are separate statutory mandates, the requirements of Section 251(b) apply to a rural LEC even if Section 251(f)(1) exempts such LECs from a concurrent Section 251(c) requirement.").

50 47 U.S.C. § 252(d)(2)(B)(i).

51 47 U.S.C. § 252(d)(2)(A)(i)(emphasis added).

52 *See, e.g., Local Competition Order,* 11 FCC Rcd 15499, 16044 ¶ 1094 (1996); *AirTouch Cellular* v. *Pacific Bell,* 16 FCC Rcd 13502 (2001).

Importantly, the statutory reciprocal compensation duty applies *regardless* of the procedure used to implement the duty, whether *via* a negotiated contract, arbitration, or tariffs.[53] Thus, even if the FCC was willing to ignore federal court decisions and its own prior holdings that mandatory, default tariffs impermissibly "circumvent the section 251 and 252 processes,"[54] the FCC would still be required to declare RLEC wireless termination tariffs as unlawful because they are incompatible with their statutory "duty to establish reciprocal compensation arrangements."

**B. Wireless Termination Tariffs Also Contravene the Section 252(d) Pricing Standards of the Act**

Congress not only imposed on LECs the substantive duty to establish reciprocal compensation arrangements, it also specified how reciprocal compensation rates shall be established if carriers choose not to use bill-and-keep. Specifically, Congress directed in Section 252(d)(2) that in establishing the rate for reciprocal compensation, costs shall be determined on the basis of "a reasonable approximation of the additional costs of terminating such calls."[55] The FCC has adopted implementing TELRIC rules,[56] and these rules have been affirmed on appeal.[57] Again, this substantive statutory requirement and the implementing regulations apply *regardless* of the procedure used to implement reciprocal compensation, whether *via* a negotiated contract, arbitration, or tariffs.[58]

For example, the Missouri court decision discussed above held that RLECs could not recover their proposed $0.02 per minute "adder" to recover a portion of their loop costs because the court was "unable to find any evidence in the record regarding the costs incurred by the rural carriers to construct and maintain their local loop facilities."[59] It was unnecessary for the Missouri court to reach this evidentiary question, however, because the FCC has squarely ruled in

53 *See TSR Wireless* v. *U S WEST,* 15 FCC Rcd 11166 (2000), *aff'd Qwest* v. *FCC,* 252 F.3d 462 (D.C. Cir. 2001)(LECs cannot escape their reciprocal compensation obligations simply by filing inconsistent state tariffs). If a LEC cannot lawfully enforce state tariffs that are incompatible with FCC rules, it necessarily follows that a LEC cannot enforce state tariffs that are incompatible with duties imposed in federal statutes.

54 *Bell Atlantic* v. *Global NAPs Order,* 15 FCC Rcd 12946, 12959 ¶ 23 (1999), *aff'd* 15 FCC Rcd 5997, 6002 ¶ 14 (2000).

55 47 U.S.C. § 252(d)(2)(A)(ii).

56 *See, e.g.,* 47 C.F.R. § 51.705.

57 *See Verizon Communications* v. *FCC,* 535 U.S. 467 (2002). Courts have further held that state commissions are required to apply the TELRIC rules, even when a state legislature directs its PUC to use a different pricing standard. *See AT&T* v. *Illinois Bell Telephone,* 349 F.3d 402 (7th Cir. 2003).

58 Section 252(d)(2) states on its face that the "additional cost" requirement applies for "the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5)." 47 U.S.C. § 252(d)(2)(A). As noted above, the obligations imposed by Section 251(b) apply without regard to the procedures used to implement the statute, and the FCC has specifically ruled that terms in state tariffs which are inconsistent with federal substantive law are null and void. *See TSR Wireless* v. *U S WEST,* 15 FCC Rcd 11166 (2000), *aff'd, Qwest* v. *FCC,* 252 F.3d 462 (D.C. Cir. 2001).

59 *Sprint* v. *Missouri PCS, supra,* 112 S.W.3d at 27-28.

implementing the Act that LECs may not recover their loop costs in reciprocal compensation.[60] Recovery of loop costs would be flatly inconsistent with federal substantive law and is, therefore, preempted by federal law under the Supremacy Clause of the U.S. Constitution.

Similarly, last fall, CenturyTel submitted a wireless termination tariff in Minnesota seeking a termination rate of $0.02447 per minute. CenturyTel claimed that its "direct costs," which included "common overhead," were $0.00921. But CenturyTel then added another $0.01526 – 62 percent of its proposed rate – for additional "unspecified overhead costs" – remarkably arguing that it was more expensive to terminate a wireless call pursuant to a tariff than pursuant to an interconnection agreement.[61]

RLECs are certainly entitled to recover under federal law their additional costs of terminating mobile-to-land calls. But federal law is very clear that RLECs are limited to recovering their TELRIC costs and nothing more (such as CenturyTel's proposed overhead adder of 166 percent).

* * *

T-Mobile submits that the state tariff procedure is inconsistent with the comprehensive negotiation/arbitration/federal court review procedure that Congress established in the 1996 Act. However, even if the FCC determines that tariff procedures can be consistent with the statutory scheme, the FCC must at minimum declare as unlawful RLEC wireless termination tariffs because they fail to comply with the substantive provisions that Congress imposed on interconnection arrangements. An incumbent LEC cannot avoid duties imposed by federal law simply by filing a piece of paper with a state regulator declaring that it intends to follow its own, different set of rules that are incompatible with explicit federal statutory requirements and implementing agency regulations.

## III. THE COMMISSION SHOULD CONFIRM THAT, UNDER FEDERAL LAW, RLECS MAY INSTIGATE INTERCONNECTION NEGOTIATIONS

The RLECs contend that because incumbents "may," under section 252(a) of the Act, negotiate interconnection agreements "[u]pon receiving a request for interconnection, services or network elements pursuant to section 251 . . ," the incumbents are prohibited by the Act from negotiating such agreements unless an interconnection request has first been received. In other words, the RLECs argue that unless they first receive an interconnection request, Congress has left them no choice but to bypass the entire section 252 process and file unilateral tariffs.

In mandating an elaborate framework for the negotiation of interconnection arrangements and making that process the centerpiece of its local competition policy, Congress did not arbitrarily chose to prohibit such negotiations unless initiated by one party rather than the other. Section 252(a), must be read in conjunction with the section 251 provisions that it incorporates

---

60 *See, e.g., Local Competition Order,* 11 FCC Rcd 15499, 16025 ¶ 1057 (1996).

61 *See Wireless Local Termination Tariff,* Docket No. P-551/M-03-811, 2003 Minn. PUC LEXIS 133 at *15-17. (Nov. 18, 2003).

by reference, which provide only that incumbents' obligation to negotiate is triggered, and can no longer be avoided, when a telecommunications carrier requests interconnection under 251(c) or 251(b)(5) or other 251(b)-(c) accommodations. Nothing in sections 251 and 252, however, prohibits an incumbent from voluntarily opening those negotiations before an interconnection request is received, and the RLECs have suggested no reason why Congress or the Commission would want to discourage such voluntary compliance with the interconnection negotiation requirements.

As discussed in greater detail below, even if section 252(a) could be read in the restrictive fashion the RLECs propose, RLECs still could open interconnection negotiations for a reciprocal compensation agreement under Section 251(b)(5), which imposes a general duty on all telecom-munications carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Even RLECs that contend that the rural exemption con-tained in section 251(f) can be used to negate their 251(c) obligations typically admit that section 251(b)(5) agreements are unobjectionable. Further, under the more general provisions of section 201(a) of the Communications Act, which provides that each common carrier has the duty, "in cases where the Commission, after opportunity for hearing, finds such action necessary or desir-able in the public interest, to establish physical connections with other carriers . . ." As the Congress expressly provided and the Commission has confirmed, section 201(a), which places no limits upon the procedural methods by which an interconnection order may be obtained, sur-vives and is expressly preserved by the interconnection process defined in sections 251 and 252. Accordingly, section 201(a) provides ample authority for an ILEC to request interconnec-tion negotiations with a wireless carrier.

The RLECs' reading of section 252(a) also is incongruous when taken in the context of other provisions of section 252. Notably, if either party can seek arbitration of unresolved issues, either party ought to be able to request that interconnection negotiations commence in the first instance. Indeed, it defies logic to suggest that Congress imposed on LECs the "duty to establish reciprocal compensation arrangements," but then gave LECs no mechanism to estab-lish such arrangements.

Finally, and most importantly, the RLECs' reading of section 252(a) severely undermines the plain purpose and policy of sections 251 and 252. Not surprisingly, RLECs never identify a single reason how a prohibition on their requesting negotiations furthers any statutory purpose, because no such reason exists. RLECs instead use their unsupported construction of the 1996 Act as an excuse to avoid the substantive requirements of the Act simply by declaring via a state tariff they prepare that they alone will set the terms of interconnection – regardless of federal law requirements and regardless of the needs of competing carriers.

Both federal courts and the FCC have recognized that interconnection tariffs that attempt to establish unilaterally the terms of interconnection impermissibly bypass the comprehensive regime that Congress established in the 1996 Act. The FCC should, therefore, reaffirm the consistent decisions of the federal courts and its own precedent: such "default" tariffs are inconsistent with, and therefore preempted by, the procedures that Congress designed specifically for the interconnection of carrier networks.

## IV. THE COMMISSION SHOULD CONFIRM THAT, UNDER FEDERAL LAW, RLECS MAY USE "OPT IN" INTERCONNECTION TARIFFS

Some RLECs wish to convert from the current bill-and-keep arrangements to an express reciprocal compensation arrangement, as is their right. Reciprocal compensation arrangements can be imposed only following the execution of an interconnection agreement, as discussed above. Some RLECs complain, however, that the negotiation of an interconnection contract between one RLEC and one wireless carrier can constitute "a huge and unnecessary burden" for both parties.[62]

T-Mobile agrees that in many circumstances, the negotiation, possible arbitration, approval and implementation of interconnection contracts cannot be cost-justified. Most carriers exchange relatively small amounts of traffic with each other, and the cost of negotiating/arbitrating/implementing an agreement often cannot be cost justified as a result.[63] Indeed, this is precisely why most carriers interconnect indirectly with each other and do so without a contract pursuant to a *de facto* bill-and-keep arrangement.

T-Mobile nevertheless believes there is a solution for this practical problem for those RLECs wanting to replace bill-and-keep with reciprocal compensation – namely, RLECs could prepare and file reciprocal, cost-based "opt in" interconnection tariffs. As discussed above, federal courts have already ruled that "opt in" tariffs are consistent with federal law, because the tariffing carrier is "not . . . attempting to bypass the negotiation process that creates interconnection agreements," but is rather "ensur[ing] that a [competitive carrier] will be able to obtain the most favorable prices and terms available."[64]

RLEC "opt in" tariffs that are reciprocal have the potential to narrow substantially the scope of interconnection negotiations because, if the tariff provisions are reasonable, a competitive carrier will adopt the tariff terms rather than spend the time negotiating (and possibly, arbitrating) different terms. Wireless carriers are under strong competitive pressure to keep operational costs to a minimum, and they have every incentive to agree to reasonable "off the shelf" terms and conditions contained in "opt in" tariffs. T-Mobile recommends that the FCC confirm what most federal courts have already held –that, ***optional*** "opt in" interconnection tariffs,

---

62 *See* Michigan ILEC Comments, CC Docket No. 01-92, at 2 (Oct. 18, 2002). However, some RLECs choose to bill for call termination regardless of the amounts of traffic involved. *See* AT&T Wireless Ex Parte, CC Docket 01-92 (July 7, 2003)(including a RLEC bill for $0.55).

63 A consultant for certain RLECs recently estimated that approximately 15 percent of its clients' incoming traffic originated on wireless networks. *See* Fred Williamson & Associates Ex Parte, CC Docket No. 01-92, Table 4 (May 7, 2003). However, there may be ten – or more – wireless carriers that are terminating local traffic within the MTA to a particular rural ILEC. Thus, in evaluating whether direct interconnection and/or interconnection contracts can be cost justified between a particular RLEC and a particular wireless carrier, the amount of traffic involved may constitute only 1.5 percent of the RLEC's incoming traffic.

64 *U S WEST* v. *Sprint,* 275 F.3d 1241, 1250 (10th Cir. 2002).

whereby the competitive carrier "opts into" individual tariff provisions as part of an interconnection agreement, are consistent with the 1996 Act.[65]

## IV. THE NEED FOR A DECLARATORY RULING HAS BECOME MORE PRESSING WITH THE PASSAGE OF TIME

When T-Mobile filed its declaratory ruling petition nearly two years ago, the issue of wireless termination tariffs had arisen in only a handful of states. Today, formal proceedings (petitions, arbitrations, tariff investigations) are ongoing in more than 13 states, and wireless termination tariffs have been filed in at least 20 states.[66]

For example, earlier this year, the Alabama PUC noted that there are "compelling legal arguments" that wireless termination tariffs are inconsistent with, and therefore preempted by federal law.[67] Nevertheless, other than citing a single federal district court opinion that was reversed on appeal,[68] this PUC affirmed the RLEC wireless tariffs without conducting any preemption analysis.[69] The Minnesota Commission has similarly upheld wireless termination tariffs without conducting any preemption analysis.[70]

Congress has authorized the FCC to "issue a declaratory order to terminate a controversy or remove uncertainty," and such declaratory rulings shall have "like effect as in the case of other orders."[71] The FCC has noted that declaratory rulings can provide "guidance to remove uncertainty and terminate controversy," can "assist state commissions in acting expeditiously to fulfill their obligations under" the Act, and can "further the goals of the Act by ensuring that new entrants have a fair opportunity to provide service to consumers living in high-cost areas."[72]

---

65 T-Mobile is not suggesting that RLECs would be required to file optional "opt-in" tariffs. The decision whether or not to prepare and file such tariffs would be made by each RLEC.

66 *See, e.g.*, AT&T Wireless/Sprint PCS/Verizon Wireless Ex Parte, CC Docket No. 01-92 (Dec. 12, 2003); Nextel Ex Parte Letter, CC Docket No. 01-92 (Dec. 10, 2003); AT&T Wireless Ex Parte Letter, CC Docket No. 01-92 (July 7, 2003).

67 *See Petition for Declaratory Ruling by Alabama's Rural Incumbent Local Exchange Carriers*, Docket No. 28988, 2004 Ala. PUC LEXIS 27 at *49 (Jan. 24, 2004).

68 *See id.* at note 82. The Sixth Circuit revised *Michigan Bell* v. *MCI*, 128 F. Supp. 2d 1043 (E.D. Mich. 2001) in *Michigan Bell* v. *MCImetro*, 323 F.3d 348 (6th Cir. 2003).

69 The Alabama PUC further held that RLECs cannot be compelled to negotiate (or negotiate in good faith, unless wireless carriers followed the procedures specified in Section 251(f)(1) of the Act. *See id.* at 51-52. But in making this ruling the PUC completely ignored the fact that under existing FCC rules promulgated pursuant to Sections 201/332, RLECs have the obligation today to negotiate with wireless carriers in good faith.

70 *See Wireless Local Termination Tariff*, Docket No. P-551/M-03-811, 2003 Minn. PUC LEXIS 133 (Nov. 18, 2003). The Minnesota PUC did cite the Missouri appellate court case discussed above, but it did not cite any of the numerous federal cases holds that mandatory tariffs are unlawful under federal law. *See id.* at n.15.

71 5 U.S.C. § 554(e).

72 *Federal-State Joint Board on Universal Service Declaratory Ruling*, 15 FCC Rcd 15168 ¶ 1, 15169 ¶ 2 (2000).

A declaratory ruling would end the chaos and uncertainty that currently exists throughout the country. Such a ruling would obviate the need for dozens of states and reviewing courts to struggle in interpreting the identical federal law. Such a ruling would also eliminate the disparate rulings that have already been rendered. Finally, such a ruling would promote the charge that Congress has given to the FCC: "establish a Federal regulatory framework to govern the offering of all commercial mobile services,"[73] because "the right to interconnect [is] an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."[74]

## V. CONCLUSION

In summary, the federal courts and the Commission unanimously hold that mandatory "default" interconnection tariffs that purport to govern interconnection arrangements in the absence of an intercarrier agreement are inconsistent with, and therefore preempted by, federal law. Conversely, voluntary "opt in" interconnection tariffs are consistent with federal law.

For the forgoing reasons, T-Mobile respectfully requests that the FCC promptly grant the Wireless Termination Tariff Petition. The FCC should also confirm that "opt in" interconnection tariffs that comply with the cost-based reciprocal compensation provisions of the Act, are consistent with federal law and that any LEC, including an RLEC, can request a wireless carrier to commence interconnection negotiations.

Pursuant to Section 1.1206(b)(1) of the Commission's rules, one copy of this letter is being filed with the Secretary's office for filing in CC Docket No. 01-92.

Respectfully submitted,

Harold Salters

Harold Salters
Director, Federal Regulatory Affairs

Daniel J. Menser
Director, Legal and Regulatory Affairs

Greg Tedesco
Director, Interconnection Strategy and Policy

T-Mobile USA, Inc.
401 Ninth Street, N.W., Suite 550
Washington, D.C. 20004
(202) 654-5900

---

73 H.R. CONF. REP. NO. 103-213, 193d Cong., 1st Sess., at 490 (1993).

74 H.R. REP. NO. 103-111, 193d Cong., 1st Sess., at 260-61 (1993).

cc: Jennifer Manner
Matt Brill
Sheryl Wilkerson
Jessica Rosenworcel
Daniel Gonzalez
Sam Feder
Barry Ohlson
Scott Bergmann